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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re

SHAWN ARLIN DONLEY,

On Habeas Corpus.

F071524

(Super. Ct. No. SCR013509)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Madera County. Ernest J. LiCalsi, Judge.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Darren K. Indermill and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Franson, J. and DeSantos, J.

In 2015, defendant Shawn Arlin Donley appealed, contending the trial court should have struck a prior prison term enhancement because the felony underlying the enhancement had been reduced to a misdemeanor under Proposition 47. In 2016, we affirmed. The Supreme Court granted review and has now transferred the case back to us to vacate our decision and reconsider the case in light of *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), filed on July 30, 2018. The parties have filed supplemental briefs, and the People concede the enhancement must be stricken. We vacate our prior decision and deem defendant's appeal a petition for writ of habeas corpus (*People v. Segura* (2008) 44 Cal.4th 921, 928, fn. 4 [treating appeal as petition for writ of habeas corpus]).¹ We grant the petition, order the sentence vacated, and remand for resentencing.

BACKGROUND

On May 23, 2013, a jury convicted defendant of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1);² count 1) and two counts of felony vandalism (§ 594, subd. (b)(1); counts 2 & 3). On May 28, 2013, the trial court found true four prior prison term allegations (§ 667.5, subd. (b)).

On August 9, 2013, the trial court sentenced defendant to nine years four months, as follows: four years on count 1, eight consecutive months on count 2, eight consecutive months on count 3, plus four one-year prior prison term enhancements (§ 667.5, subd. (b))—one of which was based on a 2004 felony conviction for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) in case No. 01S2168A.

On August 20, 2013, defendant filed a notice of appeal.

¹ The parties do not object to our deeming the appeal a habeas proceeding.

² All statutory references are to the Penal Code unless otherwise noted.

On November 4, 2014, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).)

On February 20, 2015, defendant filed, in propria persona, a “Motion for Sentence Modification/Resentencing,” in which he cited Proposition 47.

On March 19, 2015, the trial court granted defendant’s petition/request to reduce the 2004 felony conviction for possession of a controlled substance to a misdemeanor under Proposition 47.

On April 21, 2015, the trial court denied defendant’s “Motion for Sentence Modification/Resentencing,” refusing to strike the prior prison term enhancement based on the reduced conviction.

On April 29, 2015, defendant appealed the trial court’s denial of his motion for resentencing.

On June 2, 2015, we filed our opinion in *People v. Donley* (June 2, 2015, F067912) [nonpub. opn.], staying the term on count 3 and affirming as so modified.³

On August 3, 2016, we filed our opinion in *People v. Donley* (August 3, 2016, F071524) [nonpub. opn.], affirming the trial court’s denial of defendant’s request to strike the prior prison term enhancement.

On September 19, 2018, the Supreme Court transferred the case back to this court.

DISCUSSION

“Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).” (*Rivera, supra*, 233 Cal.App.4th at p. 1091.)

³ We take judicial notice of the opinion and record in case No. F067912.

Proposition 47 also created a new resentencing provision, section 1170.18, that provides procedural mechanisms for (1) resentencing for inmates currently serving sentences for Proposition 47-eligible felonies that are now misdemeanors (§ 1170.18, subds. (a), (b)); and (2) designation of Proposition 47-eligible felonies as misdemeanors for persons who have already completed their sentences (§ 1170.18, subds. (f), (g)). (See *Buycks, supra*, 5 Cal.5th at pp. 876-877; *Rivera, supra*, 233 Cal.App.4th at pp. 1092-1093.) Once a felony is reduced to a misdemeanor under Proposition 47, it “shall be considered a misdemeanor for all purposes” (§ 1170.18, subd. (k).)

In *Buycks*, the Supreme Court resolved an issue on which the appellate courts had disagreed—whether a felony reduced to a misdemeanor under Proposition 47 can still function as the basis for a prior prison term enhancement. *Buycks* concluded that “section 1170.18, subdivision (k) can negate a previously imposed section 667.5, subdivision (b), enhancement when the underlying felony attached to that enhancement has been reduced to a misdemeanor under [Proposition 47].” (*Buycks, supra*, 5 Cal.5th at p. 890.)

Buycks noted, however, that the mechanism for addressing these already imposed but now unsupported enhancements is not specified by Proposition 47: “Proposition 47 does not provide a specific mechanism for recalling and resentencing a judgment solely because a felony-based enhancement has been collaterally affected by the reduction of a conviction to a misdemeanor in a separate judgment.” (*Buycks, supra*, 5 Cal.5th at p. 892.) *Buycks* provided two options for dealing with these enhancements.

First, *Buycks* explained that when a trial court grants a Proposition 47 petition on a current Proposition 47-eligible felony conviction under section 1170.18, subdivision (a), and thus is required to fully resentence the defendant, the court should at that time also reevaluate whether any enhancements in that judgment are no longer applicable because the felony convictions underlying them have also been reduced to misdemeanors under

Proposition 47. If so, the court may not reimpose those enhancements “because at that point [a] reduced conviction ‘shall be considered a misdemeanor for all purposes.’” (§ 1170.18, subd. (k).) Under these limited circumstances, a defendant may ... challenge any prison prior enhancement in that judgment if the underlying felony has been reduced to a misdemeanor under Proposition 47, notwithstanding the finality of that judgment.” (*Buycks, supra*, 5 Cal.5th at pp. 894-895; see *id.* at p. 896.)

Second, *Buycks* explained that even when a defendant petitions only to reduce a Proposition 47-eligible conviction underlying an enhancement, courts are authorized to strike those enhancements: “[A]s to nonfinal judgments containing a section 667.5, subdivision (b) one-year enhancement, ... Proposition 47 and the *Estrada* rule authorize striking that enhancement if the underlying felony conviction attached to the enhancement has been reduced to a misdemeanor under [Proposition 47].” (*Buycks, supra*, 5 Cal.5th at p. 888.) But *Buycks* noted that in these cases, where there is no resentencing of a current Proposition 47-eligible felony conviction, another mechanism for challenging the enhancement is required. The court resolved this dilemma by concluding that the defendant may seek relief via a petition for writ of habeas corpus under section 1170.18, subdivision (k). (*Buycks, supra*, at p. 895.) “[T]he collateral consequences of Proposition 47’s mandate to have the redesignated offense ‘be considered a misdemeanor for all purposes’ can properly be enforced by means of petition for writ of habeas corpus for those judgments that were not final when Proposition 47 took effect. [¶] [T]he ‘misdemeanor for all purposes’ language of section 1170.18, subdivision (k), is an ameliorative provision distinct from the ameliorative provisions of subdivisions (a) and (f) of the same statute which provide express mechanisms for reducing felony convictions to misdemeanors.” (*Ibid.*) Noting that habeas petitions have been used to afford relief where a collateral attack on

enhancements is concerned, *Buycks* concluded a habeas petition is the appropriate vehicle for a defendant to seek relief under such circumstances. (*Id.* at pp. 895-896.)

In this case, the second option applies because the trial court sentenced defendant before granting his Proposition 47 petition to reduce the convictions underlying his prior prison term enhancements, and there was no Proposition 47-eligible current felony to be resentenced. Rather than require defendant to file a petition for writ of habeas corpus in the sentencing court, we conclude the better course is to deem this appeal to be a habeas corpus proceeding. We will strike the enhancement and remand for resentencing.

DISPOSITION

The appeal is deemed to be a petition for writ of habeas corpus. The petition is granted. The prior prison term enhancement based on the reduced 2004 conviction for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) is stricken and the matter is remanded for resentencing.